IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Civil Revision No.42 of 2005.

Judgment Reserved on:12.06.2007

Date of decision: 18.06.2007

State Bank of India, Bilaspur …**Petitioner**

Versus

Indira Building Works and Others …**Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Petitioner: **Mr.K.D. Sood, Advocate.**

For Respondents 1 to 4: **Mr.T.S. Chauhan, Advocate.**

Dev Darshan Sud,J.

The Decree Holder is aggrieved by the judgment of the learned Executing Court passed in an application under Section 47 of the Code of Civil Procedure objecting the execution of the decree. A compromise decree for recovery of Rs.43,065.40 paise was passed in the suit on 10.11.1994. In execution proceedings, the executability of the decree has been challenged by the Judgment Debtor alleging fraud. It has been stated that while instituting the suit, in which the compromise was entered into, a fraud has been practiced on the Judgment Debtor, as on 21.10.1991, a sum of Rs.35,000/- was not shown in

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

the account of the Judgment Debtor which, if considered, would wipe out the entire liability of the Judgment Debtor. The suit, out of which present proceedings arise, had been filed on 12.8.1993. The learned Executing Court allowed the petition and a direction was issued to the Decree Holder to pay costs of Rs.5000/- and also to refund the purported excess amount of Rs.35,000/- with interest @ 9% per annum with quarterly rests till final payment.

I have heard learned counsel for the parties and have gone through the record.

The Executing Court has mis-directed itself on the question which was the subject matter of the objection petition. It is by now well settled that the question of fraud is to be agitated by way of a separate suit.

In ***Adappa Papamma and Another*** *vs.* ***Darbha Venkayya and Others, AIR 1935 Madras 860***, the Full Bench of the Madras High Court has held that pre-decretal event, compromise or arrangement cannot be pleaded as a defence to the execution.

To similar effect is the judgment of the same High Court in ***K.Radhakrishna Chetty*** *vs.* ***M/s. N.Rajagopal Pillai and Co., AIR 1972 Madras 107,*** in which the Hon'ble Court has held:-

> *"4. The only question that remained to be considered is whether this pre-decretal arrangement could be gone into in execution proceedings. It is clear*

from page 223 of Mullah's Civil P.C. 13th Edn. That there is conflict of opinion among the several High Courts on this question, but so far as this High Court is concerned, it has been held that a disagreement which related to the mode of execution or satisfaction of a decree and one which has the effect of rendering a decree nugatory and in executable in whole or in part and that while the former could be pleaded in execution, the latter could not be. This is clear from the Full Bench decision in A.Papamma v. Venkiah, ILR 58 Mad 994 = (AIR 1935 Mad 860) (FB). The alleged arrangement put forward by the petitioner is an attack against the decree of this court in C.R.P. 1991 of 1966 and it is not one of the characters referred to in Chindambaram Chettiar v. Krishna Vathiyar, ILR 40 Mad 233 = (AIR 1918 Mad 1174) (FB) which related only to the mode of execution. Hence, the plea raised by the petitioner cannot be entertained by the executing court under Section 47. Civil P.C. and the remedy of the petitioner, if any, is by an independent suit, I may add that the respondent does not admit the genuineness of the receipt relied on by the petitioner".

Following these judgments, the High Court of Punjab and Haryana in ***Harnam Singh and others*** *vs.* ***Arbindu Nath and others, AIR 2004 P.& H.210,*** has held that any

event occurring before the passing of the judgment is a matter of pleading in defence in a suit and cannot be raised by way of an objection of executability under Section 47 of the Code of Civil Procedure.

My attention has also been drawn on a judgment of the Hon'ble Supreme Court in ***S.P. Chengal Varaya Naidu (Dead) by LRs.*** *vs.* ***Jagannath (Dead) by LRs. and Others, (1994) 1 SCC 1.*** The Hon'ble Supreme Court, while dealing with the question of fraud, has held:-

> *"1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree – by the first court or by the highest court – has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings".*
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> *"6. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain*

> *advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".*

There is no dispute with this proposition of law. *Fraud,* as held by the Hon'ble Supreme Court, vitiates all transactions and no party can be given advantage of obtaining a judgment passed by suppression of facts. There is no explanation as to why a compromise was arrived at when the purported transfer of Rs.35,000/- had already been made much prior in point of time to the institution of the suit. The Judgment Debtor cannot plead innocence of knowledge of this fact. Why was this not taken as a defence in the suit? Surely the Judgment Debtors cannot plead ignorance of these facts. Moreover, the learned Executing Court has lost sight of the fact that the banker's lien extends to the other accounts of his customer also. The judgment does not show a consideration of these facts.

The High Court of Delhi in ***Addisons Paints and Chemicals Ltd.*** *vs.* ***M/s.Sant Ram Parma Nand and others, AIR 1976 Delhi 137,*** has held:-

> *"The question whether the compromise deed was obtained from the defendants/ judgment-debtors by mis-representation or fraud is not one which relates to the inherent jurisdiction of the Court. The executing Court has no jurisdiction to go into the question whether the compromise agreement on which the decree was based was valid or binding*

on the judgment-debtors, for that would be defeating the decree on the allegation that it was obtained by fraud. If the consent to this compromise deed was obtained by fraud or misrepresentation, the agreement is still a contract but voidable at the option of the parties whose consent was so obtained. The contract continues to be valid till the defrauded party elects to avoid it. There was no rescission of the compromise till the date of passing of the decree and the Court could validly act on that compromise and pass a decree. Under Order 23, Rule 3 of the Code of Civil Procedure, the Court had jurisdiction to pass a decree where it was proved to the satisfaction of the Court that the suit has been adjusted by any lawful compromise. Compromise is an adjustment of the controversies in the suit by mutual concession. The Court could not be said to be lacking in inherent jurisdiction, if it acted upon a compromise which had not been rescinded, even if it is assumed that it was obtained by misrepresentation or fraud. The decree is not a nullity but might at best be invalid. A valid decree cannot be challenged in the execution proceedings. The consent/compromise decree being only the contract between the parties with the seal of the Court super added to it, a suit may lie to set aside that decree on any of the grounds of which

the contract is voidable such as fraud or misrepresentation, but such a question cannot be raised in the Executing Court. The questions relating to misrepresentation or fraud do not relate to the execution of a decree but relate to impeaching the decree itself; as being voidable or void having been obtained on a compromise which itself was obtained by fraud or misrepresentation. It amounted to a plea that the decree was voidable or even void or that it was wrongly passed by the Court. Again if the question of want or absence of jurisdiction cannot be determined without an amount of research the executing Court is not competent to permit that enquiry to be made which would require the Court to take evidence. Section 47 of the Code of Civil Procedure is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. The Court executing the decree is not competent to embark on an enquiry into facts, which if established, will tend to show that the Court passing the decree had no jurisdiction to do so. The executing Court can only go into the question whether or not the decree is a nullity, where on the face of the decree it is apparent that the Court passing the decree had no jurisdiction or there are

> *patent reasons for doubting the inherent jurisdiction of the Court. "When a decree is made by a Court which has no jurisdiction to make, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. Where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which would have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction". (See V.D. Modi v. Abdul Rahman, (AIR 1970 SC 1475) (supra). The questions relating to the obtaining of the compromise by fraud and misrepresentation, therefore, do not relate to the execution of the decree and are thus outside the scope of the objections under Section 47 of the Code of Civil Procedure".*

The remedy of the respondent-Judgment Debtor lies elsewhere. He cannot be allowed to urge this point in proceedings under Section 47 of the Code of Civil Procedure.

In the facts and circumstances of the case, I find that the Executing Court has acted in exercise of its jurisdiction with material irregularity and illegality. The judgment and decree under challenge in

this revision are, therefore, quashed and set aside and the matter is sent to the Executing Court with direction to proceed afresh expeditiously in accordance with law. Parties to appear before the executing Court on ***30th June, 2007***. The records of the case be sent back immediately. There shall be no order as to costs.

June 18, 2007 **(Dev Darshan Sud)**
(aks) **Judge.**